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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
8/17/2021
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

TIMOTHY AARON SWINNEY
Appellant

v.

THE STATE OF TEXAS
Appellee

NO. 09-18-00474-CR & 09-18-00475-CR
COURT OF APPEALS
FOR THE NINTH DISTRICT OF TEXAS

On Appeal from Cause Number ND 7248 & ND 7289
From the 1-A District Court of Newton County, Texas

APPELLANT'S BRIEF

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ORAL ARGUMENT RESPECTFULLY REQUESTED

IDENTITY OF PARTIES AND COUNSEL

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PRESIDING JUDGE:	Hon. DeLinda Gibbs-Walker 1-A District Court Newton County, Texas 75966

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STATEMENT OF THE CASE

Appellant was charged in cause numbers ND-7248 and ND-7289 with Aggravated Assault with a deadly weapon both alleged to have occurred on or about November 25, 2016. (1 CR at 4; 2 CR at 4). On November 7, 2018, following a jury trial, the Appellant was found guilty in both charges of Aggravated Assault with a Deadly Weapon. (1 C.R. at 81; 2 C.R. at 50). The jury assessed punishment and sentenced the Appellant to eight (8) years in cause number ND-7248 and two (2) years in cause number ND-7289 in the Institutional Division of the Texas Department of Criminal Justice. The Appellant timely filed notice of appeal on December 11, 2018. (1 C.R. at 102; 2 C.R. 56).

The 9th Court of Appeals affirmed the conviction on January 27, 2021, in an opinion not designated for publication. *Swinney v. State*, 2021 Tex. App. LEXIS 610, 2021 WL 261568 (Tex. App. Nos. 09-18-00474-CR, 09-18-00475-CR – Beaumont, delivered January 27, 2021). A motion for rehearing was filed in the Court of Appeals on March 5, 2021 and denied on March 12, 2021. A petition for discretionary review was filed May 13, 2021, and granted by this Court on June 30, 2021. This brief is timely filed.

STATEMENT REGARDING ORAL ARGUMENT

The Appellant believes that oral argument would assist this Court in explication and disposition of the ground presented for review because the State's appellate brief also acknowledged Appellant is entitled to relief and requested that the Court of Appeals reverse the trial court's judgments as to sentence. Therefore, Appellant respectfully requests oral argument.

ISSUE PRESENTED

The Court of Appeals erred by applying the incorrect prejudice standard to determine that the Appellant cannot meet his burden to show the outcome of his trial would have been different had he been correctly advised that only the jury could consider placing him on probation.

Swinney v. State, 2021 Tex. App. LEXIS 610, 2021 WL 261568 (Tex. App. Nos. 09-18-00474-CR, 09-18-00475-CR – Beaumont [9th Dist.], delivered Jan. 27, 2021).

STATEMENT OF FACTS

At trial for two cases of aggravated assault with a deadly weapon, Appellant's attorney made it clear that he believed the court could sentence Appellant to probation. *See* 4 R.R. 5, 8; 6 R.R. 41-42; 8 R.R. 10-12, 91-95. Additionally, trial counsel filed a handwritten election for punishment and a handwritten motion for probation in both cases. 1 C.R. 75-76; 2 C.R. 44-45. The defendant's election was originally for the jury to assess punishment; however, jury was crossed out and replaced with judge. 1 C.R. 75-76. Appellant's motion for probation states that in the event of a finding of guilt, defendant has never before been convicted or given probation for a felony and requests probation if found guilty. 1 C.R. 76; 2 C.R. 45; 4 R.R. 3.

Appellant swore that the motion for probation was his request if found guilty and that he was requesting the judge to assess punishment in both cases if found guilty. 4 R.R. 3. The trial court affirmed with Appellant that he intended to switch his punishment to election to the judge. 4 R.R. 4. Trial counsel told the court his client

wanted probation and that had been his counteroffer to the State during plea bargaining. 4 R.R. 4.

During the punishment hearing to the judge, the State pointed out that the Texas Code of Criminal Procedure prohibits the judge from giving probation in this case. 8 R.R. 93. But, trial counsel maintained Appellant was eligible for probation from the judge under the statue. 8 R.R. 94. He continued to argue for probation in his sentencing closing to the judge. 8 R.R. 95. The trial court sentenced Appellant to serve eight years, in cause number 7248, and two years, in cause number 7289, in the penitentiary. 8 R.R. 99.

SUMMARY OF THE ARGUMENT

The court of appeals acknowledged that trial counsel failed to properly advise Appellant that the trial court could not assess probation for aggravated assault of a deadly weapon, but erred in finding the record was insufficient and holding that the Appellant cannot meet his burden of ineffective assistance of counsel under the prejudice prong. While noting the holding to establish lack of prejudice in *State v. Recer*, the court of appeals ignored the more recent and analogous holding establishing prejudice in *Miller v. State*. *State v. Recer*, 815 S.W.2d 730 (Tex. Crim. App. 1991); *Miller v. State*, 548 S.W.3d 497 (Tex. Crim. App. 2018).

ARGUMENT

Issue: The Court of Appeals erred by applying the incorrect prejudice standard to determine that the Appellant cannot meet his burden to show the outcome of his trial would have been different had he been correctly advised that only the jury could consider placing him on probation.

A Texas jury may recommend probation for a felony conviction of aggravated assault with a deadly weapon where the defendant files a written sworn motion with the judge that the defendant has not previously been convicted of a felony. Tex. Code Crim. Proc. Ann. art. 42.A.055(b)(1) (West 2018). However, Texas law forbids a trial court to grant probation to an individual when there is an affirmative finding that a deadly weapon was used. Tex. Code Crim. Proc. Ann. art. 42.A.054(b)(2) (West 2018). Appellant's trial counsel repeatedly made it clear on the record that he believed the trial court could sentence Appellant to probation. (4 R.R. 5, 8; 6 R.R. 41-42; 8 R.R. 10-12, 91-95). Further the court of appeals opinion states "we agree with Swinney that the record shows his attorney misled him about whether the trial court could consider probation." (Opinion at 13).

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both: (1) deficient performance; **and** (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 2064, 80 L.Ed. 2d 674 (1984). The Ninth Court of Appeals applied the incorrect prejudice standard to determine that the record is insufficient for Appellant to establish ineffective assistance of

counsel based on his counsel's inaccurate advice. (Opinion at 13-14, 16). The Court of Appeals held Appellant cannot show his trial would have been different had he been correctly advised. *Id.*

The opinion cites *State* v. *Recer* while ignoring *Miller v. State*, which was cited in both Appellant and State's briefs. *See* Opinion p. 16, n 40; *State v. Recer*, 815 S.W.2d 730 (Tex. Crim. App. 1991); *Miller v. State*, 548 S.W.3d 497 (Tex. Crim. App. 2018). In *State v. Recer*, this Court reversed the court of appeals ruling awarding the defendant a new trial when the record did not reflect that she went to the trial judge for sentencing *solely* because of her attorney's erroneous impression that the trial judge could set aside the affirmative finding and grant her probation. The Court stated that to support a claim of ineffective assistance of counsel where the complaint is that counsel misunderstood the law regarding probation there must be evidence that the defendant was initially eligible to receive probation. *State v. Recer*, 815 S.W.2d at 731. The presentence investigation report and motion for probation in that case revealed the defendant may have had a prior felony conviction, which would have precluded the jury from recommending probation. *Id.* There is no dispute that Appellant was eligible for probation from a jury. *State v. Recer* is not contrary to the more current holding in *Miller*. In fact, *Miller* cites *State v. Recer* as one of the basis for its holding. *Miller*, 548 S.W.3d at 498. Appellant's case facts more closely match the *Miller* case.

In *Miller*, the defendant was charged with aggravated sexual assault of a child and indecency with a child and, if convicted, neither of those offenses are eligible for probation from a judge. *Miller*, 548 S.w.3d 497. *Miller*'s trial counsel advised him otherwise and he waived a jury and the trial court sentenced him to twenty-two and ten years respectively. *Id.* at 498. This Court held that a defendant meets the prejudice prong of his ineffective assistance of counsel claim by demonstrating that he would have opted for a jury if his attorney had correctly advised him that he was ineligible for probation from the trial court. *Id.* He does not have to show that the likely outcome of the jury he waived would have been more favorable than the court trial. *Id.* It is not the correct prejudice standard to evaluate based on the likely outcomes of proceedings not had. *Id.* at 500.

Appellant's case is distinguishable from *State v. Recer* and analogous to *Miller*. Appellant filed motions for probation in both cases. (1 C.R. 76; 2 C.R. 45). The judge requested that Appellant swear that the motions for probation were his request if found guilty and that he was requesting the judge to assess punishment in both cases if found guilty. (4 R.R. 3). Trial counsel told the court his client wanted probation and that had been his counteroffer to the State during plea-bargaining. (4 R.R. 4). Appellant's counsel stated on the record that he would not appeal if sentenced to probation and that Appellant was "simply asking for probation, ten years probation." (7 R.R. 41-42; 8 R.R. 12).

The court of appeals applied the wrong prejudice standard in our case. It is clear from the record that it was Appellant's desire to seek probation and the record is sufficient to demonstrate a reasonable likelihood that he would have opted for a jury to assess punishment if his attorney had correctly advised him about his probation eligibility from the trial court.

PRAYER FOR RELIEF

Appellant respectfully prays that this Court issue an opinion reversing the Court of Appeals' judgment and remand to the trial court.

Respectfully Submitted,

/s/ Tonya Rolland

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was delivered to the following on August 16, 2021.

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/s/ Tonya Rolland
Tonya Rolland

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